88-619

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DONNELLY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR

A WRIT OF CERTIORARI

Appeal from the United States Court of Appeals for the Third Circuit Court of Appeals at No. 87-3860, Order affirming Judgment of the District Court

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QUESTIONS FOR REVIEW

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN PERMITTING THE GOVERNMENT TO INTRODUCE EVIDENCE IN ITS CASE-IN-CHIEF OF THE APPELLANT'S ATTITUDE TOWARDS CHILDREN?

II. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN PERMITTING THE GOVERNMENT TO CROSS-EXAMINE A DEFENSE CHARACTER WITNESS BY REFERENCE TO SPECIFIC EXTRINSIC ACTS ALLEGEDLY COMMITTED BY APPELLANT?

III. DID THE DISTRICT COURT ERROR IN DENYING APPELLANT'S MOTION FOR DEMURRER AND MOTION FOR DIRECTED VERDICT OF ACQUITTAL AS TO COUNT 5 OF THE INDICTMENT?

TABLE OF CONTENTS

	Page
Questions for Review.	1
Table of Contents	2
Table of Citations.	3
Opinion Below	4
Jurisdiction	5
Constitutional Provisions	6
Statement of Case	7-10
Reasons for Granting the Writ . . .	11-26
Conclusion.	27
Appendix.	28-29
Certificate of Service.	30

TABLE OF CITATIONS

CASES

CASES	PAGE
Mason v. U.S., 408 F.2d 903, 906, (10th Cir. 1969).....	12
U.S. v. Crews, 781 F.2d 826 (10th Cir. 1986).....	13
U.S. v. Jacobs, 473, F.2d 461 (10th Cir.) cert. denied, 412 U.S. 920, 93 S. Ct. 2740, 37 L.Ed2d 147 (1973).....	14
U.S. v. Lum, 466 F. Supp. 328 (1979).....	12
U.S. v. Saintil, 753 F.2d 984, 989 (11th Cir. 1985).....	16
U.S. v. Shavers, 615 F.2d 266 (C.A. 5th, 1980).....	21
U.S. v. Winston, 145 U.S. App. D.C. 67, 447 F.2d 1236 (1971).....	12

OPINION BELOW

The Petitioner appealed from the judgment of sentence entered December 18, 1987 before the United States District Court for the Western District of Pennsylvania at CR87-174. The United States Court of Appeals for the Third Circuit affirmed the judgment of sentence at No. 87-3860 on June 16, 1988 without written opinion.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254. The judgment of sentence was affirmed by the United States Court of Appeals for the Third Circuit on June 16, 1988 and this Petition is timely filed within sixty (60) days thereafter.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the Constitution of the United States:

> ".....nor shall any state deprive any person of life, liberty or property without due process of law....."

STATEMENT OF THE CASE

In September of 1987, the Appellant, William Donnelly was indicted by the United States Government of 10 counts of criminal offenses involving:

COUNT 1 - the mailing of an explosive device to Thomas Hensler which exploded at the Irwin Post Office in violation of Title 18, United States Code, Section 1716;

COUNT 2 - maliciously damaging the Irwin Post Office by means of an explosive device, in violation of Title 18, United States Code, Section 844(f);

COUNT 3 - possessing a destructive device which was not registered to him in violation of Title 26, United States Code, Section 5861(d).

COUNT 4 - manufacturing a destructive device in violation of Title 26, United States Code, Section 5822 and Section 5861 (f);

COUNT 5 - possessing a destructive device which was not properly identified, in violation of Title 26, United States Code, Section 5861(i), Section 5842(c) and 27 Code of Federal Regulations, Section 179.102;

COUNT 6 - possessing a destructive device which was not registered to him in violation of Title 26, United States Code, Section 5861(d);

COUNT 7 - manufacturing a destructive device in violation of Title 26 United States Code, Section 5861(f);

COUNT 8 - the writing and mailing an extortionist communication to Standard Observer Newspaper in violation of Title 18, United States Code, Section 876;

COUNT 9 - the writing and mailing of a communication to KDKA containing a threat to injure T.D. Hensler, R. Phillips and Westmoreland County Commissioner Ted Simmon, in violation of Title 18, United States Code, Section 876;

COUNT 10 -the writing and mailing of a communication to the Standard Observer containing a threat to damage property of Consolidation Coal Company, in violation of Title 18, United States Code, Section 876.

On November 20, 1987, the Apellant was convicted by a jury of Counts 1, 2,3,4,5,6,7 and 9 of the above mentioned counts, and was not found guilty of

Counts 8 and 10.

This case essentially involves the mailing of an explosive device to an individual by the name of Thomas Hensler, the placing of a bomb at the Norwin High School, and the mailing of various written threatening communications--all designed ostensibly to compel the termination of the use of certain real property located in Turner Valley, Westmoreland County, by Norwin Soccer Club. The Norwin Soccer Club had been using this property for the purpose of playing soccer matches, and the property in question abutted a residential development commonly known as Turner Valley, wherein the Appellant resided.

In his opening address to the jury, defense counsel suggested that appellant was not the type of individual who would commit these crimes. During the government's case-in-chief, the

prosecutor attempted, through various witnesses, to elicit the appellant's attitude towards children. This testimony was permitted by the learned Trial Court over defense counsel's timely objections.

Additionally, the defense counsel called various witnesses to testify as to appellant's good reputation for peacefulness and good order. The prosecution was permitted by the learned Trial Court to impeach these witnesses by reference to specific extrinsic alleged acts of appellant. Defense counsel made timely objections as to this line of questioning and was overruled.

REASONS FOR GRANTING WRIT

I. Q. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN PERMITTING THE GOVERNMENT TO INTRODUCE EVIDENCE IN ITS CASE-IN-CHIEF OF THE APPELLANT'S ATTITUDE TOWARDS CHILDREN?

A. YES.

The U.S.Government during the presentation of its case-in-chief called as a witness, an individual by the name of Ronald Lynn. Mr. Lynn was a co-worker of the appellant at the Pitt Energy Technology Center in Pittsburgh for a period of approximately 11 years. During direct examination Mr. Lynn was asked the following question by the Assistant U.S. Attorney:

> Mr. Curry: Did he (appellant) ever make any comments to you about his attitude towards children?
> (Record at Vol.4 pg. 87)

Defense counsel made a timely objection to this question and the objection was overruled by the District Court. It was determined by the learned

Trial Court that this line of questioning was admissible because defense counsel had "opened the door" to this by virtue of remarks made in his opening address to the jury, and because of the fact that, the appellant was accused of placing a bomb at the Norwin High School, thereby making the Defendant's attitude towards children relevant.

In United States v. Lum, 466, F.Supp. 328 (1979, the District Court held that:

> The doctrine of opening the door, of course is limited to testimony that might explain or contradict the testimony offered by the opposing party on direct examination; it cannot be 'subverted into a rule for injection of prejudice' (citing United States v. Winston, 145 U.S. App. D.C. 67, 447 F2d 1236 (1971). (emphasis added)

The United States Court of Appeals for the Tenth Circuit in Mason v. United States, 408 F.2d 903, 906 (10th Cir.1969) opined that "(I)t is well established law

that an indictment is not evidence, and that the opening statements of counsel are not evidence". (emphasis added). It is therefore asserted that counsel did not "open the door" to this line of questioning by virtue of remarks made during an opening statement because said statement is not in fact evidence in the case, and therefore, cannot be rebutted by the government on direct examination during its case-in-chief.

In an analogous case U.S. v.Crews, 781 F.2d 826 (10th Cir. 1986), the defendant was convicted of making a threat to kill the President Reagan. Under the law in effect at the time of defendant's trial, a criminal defendant was presumed sane and if some evidence of insanity is introduced from any source, the presumption of sanity disappears, and the burden is on the prosecution to prove to the satisfaction of the jury

beyond a reasonable doubt that the defendant was sane when he committed the offense charged. U.S. v. Jacobs, 473 F.2d 461 (10th Cir.) cert. denied, 412 U.S. 920, 93 S.Ct. 2740, 37 L.Ed.2d 147 (1973).

On appeal, the defendant contended that because the prosecution's opening statement suggested serious questions about the defendant's sanity, the burden of proving his sanity was thereby shifted to the prosecution. The U.S. Court of Appeals for the Tenth Circuit held "....opening statements do not constitute evidence; therefore they cannot be used to overcome the presumption that defendant was sane" U.S. v. Crews, supra, at 830.

Appellant would therefore argue that the contents of defense counsel's opening statement was not evidence, and thus could not open the door for what

might be proper rebuttal testimony on behalf of the prosecution.

Finally, appellant would note that the learned Trial Court instructed the jury that:

> "Any statements, objections or arguments made by the lawyers are not not evidence in the case..."
> (Trial Record Vol. 7 pg.10)

The learned Trial Court also determined that the Defendant's attitude toward children was relevant. Appellant would cite Federal Rule of Evidence 403:

> "Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"

It is asserted by appellant that evidence by the Government in its case-in-chief of his attitude toward

children should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. While it is acknowledged that the Trial Court has broad discretion to evaluate whether the probative value of this relevant evidence is substantially outweighed by the danger of unfair prejudice, it is asserted that the introduction of this evidence precipitated a

> "likelihood of inciting the jury to an irrational decision based on an improper basis, such as character and past conduct of the accused, rather than on the evidence presented on the crime charged" U.S. v. Saintil, 753 F.2d 984, 989 (11th Cir. 1985).

It is contended by appellant that evidence of one's dislike or even hatred for children may be the most inflammatory and prejudicial evidence ever put forth to a jury.

Appellant further contends that character evidence in the prosecution's

case-in-chief of his attitude towards children should have been excluded under Rule 404(a)(1) of the Federal Rules of Evidence Rule 404 states:

> "Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.
>
> (a) Character evidence generally.- Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused.- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; (emphasis added)
>
> (2) Character of victim.- Evidence of a pertinent trait of character of the victim of the crime offered, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness.- Evidence of the character of a witness, as provided in Rules 607, 608 and 609.
>
> (b) Other crimes, wrongs, or acts.- Evidence of other crimes, wrongs, or

> acts in not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Obviously, the prosecution sought to demonstrate that an individual who generally bore the trait of ill will towards children would be the type of person who would plant a bomb at a high school, and sought to prove that appellant acted in conformity therewith.

Rule 404(a)(1) however, permits evidence of a pertinent trait of the accused's character by the prosecution to rebut the same. However, in this case, the learned Trial Court permitted the prosecution to introduce this character evidence in its case-in-chief and appellant contends that this was error in violation of the above-stated Rule.

II. Q. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN PERMITTING THE GOVERNMENT TO CROSS EXAMINE A DEFENSE CHARACTER WITNESS BY REFERENCE TO SPECIFIC EXTRINSIC ACTS ALLEGEDLY COMMITTED BY APPELLANT?

A. YES.

At the trial of this case, appellant called as a witness an individual by the name of William F. Marincic. Mr. Marincic was called as a character witness for the appellant to testify as to appellant's good character as to peacefulness and good order.

On cross-examination, the prosecution was permitted to ask the following question:

Mr. Curry: "Had you heard in the valley that he was going to booby-trap the area?
(Trial Record Vol. 5, p. 132)

A timely objection made by defense counsel and was overruled by the learned Trial Court. Additionally, the appellant called Attorney Edward Servov as a

character witness, who testified by Appellant's reputation for peacefulness and good order. Mr. Servov, on cross-examination was asked by the prosecutor:

> Mr. Curry: "Have you heard among the people in Turner Valley that Mr. Donnelly is alleged to have made statements concerning the booby-trapping of his property to keep young people from crossing it or bothering it."
> (Trial Record Vol. 5, pgs. 153-154)

A timely objection was made by defense counsel and overruled by the learned Trial Court.

Appellant, now asserts that the learned Trial Court abused its discretion in allowing this testimony into evidence because it violates Federal Rule 404(b) of the Federal Rules of Evidence. Federal Rule 404(b) states as follows:

> "Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes."
>
> (b) Other crimes, wrongs, or acts.- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

> order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As subsection (b) states, evidence of other acts is not admissible to prove the character of a person in order to show he acted in conformity therewith.

It is asserted by appellant that even if the appellant's booby-trapping of his shed to prevent burglaries does not demonstrate any of the enumerated exceptions, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence, mistake or accident. Rather, said evidence was presented for no other purpose than to show that the appellant was a violent person who acted in accordance with his violent character.

In support of his argument, appellant cites the case of United States v. Shavers, 615 F2d 266 (C.A. 5th,1980)

which is reported in the case annotation section of Rule 404 of the Federal Rules of Evidence:

"On appeal of conviction of assault with a deadly weapon, appellant contested the admission by the district court of testimony concerning a prior incident involving appellant. The incident involved an alleged threat appellant had made while holding a knife, and appellant's motion to strike testimony related to it was denied by the district court. The court of appeals reversed, rejecting the government's contention that the evidence, while extrinsic, was admissible under Rule 404(b) if it is determined that the evidence is relevant to an issue other than defendant's character. However, it must first be determined that the extrinsic evidence requires the same intent as the charged offense and that the jury could find 1) that the defendant committed the extrinsic offense and 2) that the evidence possessed probative value not substantially outweighed by its undue prejudice. The court concluded that, as there was doubt whether the extrinsic offense was actually committed and, in any event, its prejudicial impact far outweighed its probative value, the District Court judge abused his discretion in not excluding the evidence. United States v. Shavers (CA5th, 1980) 615 F.2d 266."

In the case at bar, there was no evidence that appellant had actually booby-trapped his shed and the

prosecution offered no evidence whatsoever to substantiate a basis for this line of cross-examination of a defense character witness.

Appellant asserts that cross-examination of this defense character witness should have properly been limited to appellant's reputation for being non-peaceful and not of good order.

III. Q. DID THE DISTRICT COURT ERR IN DENYING APPELLANT MOTION FOR DEMURRER AND MOTION FOR DIRECTED VERDICT OF ACQUITAL AS TO COUNT 5 OF THE INDICTMENT.

A. YES.

Count V of the indictment alleging a violation of Title 26 United States Code, Section 5861(i) should be dismissed as being improper. Section 5861(i) should be dismissed as being improper. Section 5861(i) provided that it shall be unlawful for any person to receive or possess a firearm which is not identified by a serial number as

required by this Chapter. The operative words are "serial number" as required by this Chapter.

Section 5842(c) of Title 26, United States Code specifically provides that with respect to a destructive device shall be identified in such manner as the Secretary may by regulation prescribe. There is no provision that there shall be a serial number located upon the supposed destructive device, it merely requires that the destructive device be identified in a manner prescribed by the Secretary. The important section is then the Code, Section 179.102 of the Code of Federal Regulations dealing with identification of firearms. The first paragraph provides for the stamping, engraving or casting of a serial number on a firearm specifically a gun or revolver and all of the requirements of

the first paragraph deal with a gun,

revolver, receiver or barrel thereof. The second paragraph provides that the director may authorize other means of identification of the manufacturer, importer or maker, upon receipt of a letter in duplicate from the same showing that such identification is reasonable and will not hinder the affect of administration of the part. This relates again to the firearms as set forth in the first paragraph of Section 179.102 of the Code of Federal Regulations.

The third paragraph which is the paragraph which deals with the destructive device says that the Secretary may authorize other means of identifying that weapon upon receipt of a letter, application, in duplicate from the manufacturer, importer or maker showing that the engraving, casting or stamping such a weapon would be dangerous

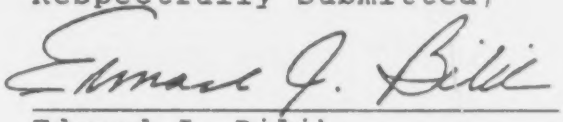
or impractical. This is the provision that deals wit destructive devices and as such, there is no requirement that it be identified by a serial number, therefore, it can be argued that the purported violation as set forth in Count V of the indictment is not operative in this instance, since there is not a requirement that this destructive device have a serial number upon it or be identified by a serial number. The more appropriate section would have been to charge the defendant with either Section 5861 (c), (d) or (f) and (i) since (i) requires only that there not be a serial number and since a serial number is not required for a destructive device, therefore, no violation of this section was alleged or proven.

CONCLUSION

For the reasons urged herein, it is respectively requested that a writ of certiorari issue to review and reverse the judgment of the United States Court of Appeals for the Third Circuit entered herein.

Dated: October 11, 1988

Respectfully submitted,



Edward J. Bilik,
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 87-3860

UNITED STATES OF AMERICA,
Appellee

vs.

WILLIAM JOSEPH DONNELLY,
Appellant

On Appeal from the United States
District Court
For the Western District of PA.
Criminal No. 87-174
(Honorable Gustave Diamond)

Argued: June 9, 1988
Before:
BECKER, STAPLETON & GREENBURG,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

1. The Distict Court abused its discretion in permitting the government to introduce evidence in its case-in-chief of the appellant's attitude towards

children.

2. The District Court abused its discretion in permitting the government to cross-examine a defense character witness by reference to specific extrinsic acts allegedly committed by appellant;

3. The District Court erred in denying appellant's motion for demurrer and motion for directed verdict of acquittal as to Count 5 of the indictment, it is hereby

ADJUDGED AND ORDERED that the judgment of the District Court be and is hereby affirmed.

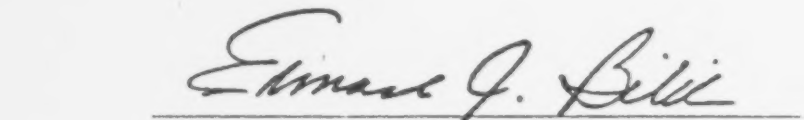
BY THE COURT:
/s/
_____
Circuit Judge
ATTEST:
/s/
_____
Chief Deputy Clerk

Dated:6/16/88
Certified to be a true copy and issued in lieu of formal mandate on 7/8/88
Test: Clerk, U.S. Court of Appeals for the Third Circuit

CERTIFICATE OF SERVICE

I, Edward J. Bilik, Esquire, do hereby certify that three (3) true and correct copies of the within Petition for Writ of Certiorari was served by mail to and upon the following:

PAUL J. BYRSH, ESQUIRE
ASSISTANT U.S. ATTORNEY
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219



Edward J. Bilik, Esquire

Dated: October 11, 1988